No. 17-130

In The
Supreme Court of the United States

RAYMOND J. LUCIA, *ET AL.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF PETITIONERS

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February 2018

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in constitutional law, securities regulation, and securities litigation. Furthermore, this *amicus curiae* has represented parties in proceedings before the Securities and Exchange Commission (the "SEC" or the "Commission"), and regularly lectures on the precise topics found in the pending controversy. This case addresses the interpretation of the Appointments Clause of Article II of the Constitution, and implicates the proper conduct of enforcement proceedings before the SEC. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of Facts set forth by the Petitioners herein, Raymond J. Lucia., *et al.* ("Petitioners").

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, as required by Supreme Court Rule 37.3(a). Petitioners, Respondent, and counsel appointed to defend the decision below all consented to this filing.

SUMMARY OF ARGUMENT

The Court's decision herein shall clarify the appropriate methodology for the constitutional appointment of ALJs across a wide range of administrative agencies, thereby cabining executive power, reinforce the Court's recent landmarks interpreting the Appointments Clause of Article II, resolve the internecine conflict among the circuit courts of appeals as to the constitutionality of the present mode of appointing SEC Administrative Law Judges ("ALJs"), and, above all else, uphold axioms of checks and balances and the separation of powers, in particular Article II's structural constraints upon the exercise of executive power.

ARGUMENT

I. THE COURT'S DECISION SHALL CLARIFY THE CONSTITUTIONALITY OF THE APPOINTMENT PROCESS FOR ALL ALJs ACROSS A WIDE RANGE OF ADMINISTRATIVE BODIES, THEREBY CABINING EXECUTIVE POWER.

While the question presented is limited to the constitutionality of the appointment of SEC ALJs, the edict to be issued by the Court shall have decisive ramifications for the appointment of all administrative adjudicators and their respective agencies. Moreover, the Court's decision shall appropriately cabin executive power, consistent with the mandates of the Appointments Clause of Article II. U.S. Const. art. II, § 2, cl. 2.

An undeniable aspect of America today is its modern administrative state. This extraconstitutional body wields great power, in large part by means of what commentators have labeled a "hidden judiciary." *See* Kent Barnett, "Against Administrative Judges," 49 *UC Davis Law Review* 1643, 1645 (2016) (quotations and citations omitted). There are reportedly a total of 1,792 administrative law judges in service to federal agencies today. 1,537 Social Security Administration ALJs alone "collectively handle hundreds of thousands of hearings a year." *Bandimere v. SEC*, 844 F.3d 1168, 1199 and 1199 n.5 and n.6 (10th Cir. 2016) (McKay, J., dissenting) (citations omitted), *petition for certiorari pending sub nom.* ___ U.S. ___ (No. 17-475) (filed September 29, 2017).

Such facts are already well known to the Court. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 586 app. C (2010) (Breyer, J., dissenting) (noting in excess of 1,500 ALJs in the employ of the federal government at that time). The above statistics regarding Social Security Administration adjudicators provide but one pungent example of the pervasive influence of appointed ALJs over the everyday lives of ordinary Americans. This lends credence to the statement that "[t]oo many important decisions of the Federal Government are made nowadays by unelected officials." *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 572 U.S. ___, ___, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).

Equally so, administrative agencies today are rightly said to comprise the "fourth branch of the U.S. Government," exerting significant power over the economic and social life of the Nation. *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016) ("*PHH I*"), *vacated, reinstated in part, and remanded*, ___ F.3d ___, 2018 WL 627055 (D.C. Cir. January 31, 2018) (*en banc*). Agencies and their nonjudicial arbiters represent one side of a conflict between "executive power and individual liberty." *PHH I*, *supra*, 839 F.3d at 5. If administrative law judges are left unrestrained, they can pose a "significant threat" to bedrock principles of separation of powers and checks and balances. *PHH I*, *supra*, 839 F.3d at 6.

The drafters of the Founding Documents could not have foreseen contemporary SEC ALJs, *Bandimere*, *supra*, 844 F.3d at 1170, nor, in all likelihood, the latter's numerous peers presently at work within the far-flung bureaucracy extant today. It is equally unlikely the Framers envisioned these administrative adjudicators outnumbering the Article III bench by a ratio of two to one. *See* http://www.uscourts.gov/judges-judgeships-authorized-judgeships (last visited January 19, 2018) (860 authorized judgeships for 2016).

Nevertheless, the founders did hold dear a justifiable concern for executive power concentrated in the hands of the one or the few, and, worse yet, such authority lacking accountability to the political will of the citizenry. It was this "fear that prompted the Framers to build checks and balances into our constitutional structure." *Dep't of Transportation v. Association of*

American Railroads, 575 U.S. ___, ___, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring in the judgment).

Thus, the authors of the Constitution wisely safeguarded our ordered system of liberty. The Framers did so with a fundamental and inarguable precept in mind. "Liberty requires accountability." *Id.*, 575 U.S. at ___, 135 S. Ct. at 1234 (Alito, J., concurring).

The foregoing maxim animates the Appointments Clause. U.S. Const. art. II, § 2, cl. 2. Above all else, the Clause insists that those who wield executive authority remain "accountable to political force and the will of the people." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 884 (1991). In regulating the manner of taking office, the proviso assures that ALJs (and, to a fair degree, their respective administrative agencies) are "accountable to the President, who himself is accountable to the people." *Dep't of Transportation*, *supra*, 575 U.S. at ___ 135 S. Ct. at 1238 (Alito, J., concurring). The Appointments Clause is one of several "accountability checkpoints" which secure separation of powers and checks and balances. *Id.*, 575 U.S. at ___, 135 S. Ct. at 1237 (Alito, J., concurring).

The case at bar encompasses a potential threat to accountability, and, consequently, individual liberty, a threat that is well familiar to the Court. Once more, the "wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting), *quoted by PHH I*, *supra*, 839 F.3d at 8. The resolution of the instant case shall forge yet another adamantine link in the

chain of precedents upholding inviolate axioms of checks and balances and separation of powers. *See Morrison*, *supra*, 487 U.S. at 697 (1988) (Scalia, J., dissenting).

It is a constitutional imperative that *all* ALJs at *all* administrative agencies attain and hold office in conformity with the Appointments Clause, and thereby honor the Framers' "dedication" and "devotion to the separation of powers." *Dep't of Transportation*, *supra*, 575 U.S. at ___, 135 S. Ct. at 144 (Thomas, J., concurring in the judgment). That is why the matter at hand is not necessarily delimited to SEC ALJs nor the Commission. Whenever the Appointments Clause is called into question, inevitably there are "systemic ramifications" for all administrative agencies. *PHH I*, *supra*, 839 F.3d at 9 n.5.

For all these reasons, this *amicus curiae* respectfully suggests that a robust and definitive interpretation of the Appointments Clause in the case at bar shall clarify the constitutionality of the appointment process for all ALJs across all federal agencies, and thereby cabin executive power in accordance with fundamental precepts of separation of powers and checks and balances.

II. THE COURT MUST ASSURE THAT *FREE ENTERPRISE FUND* IS CORRECTLY APPLIED BY THE LOWER COURTS.

For nearly a decade now, *Free Enterprise Fund*, *supra*, has been the pivot upon which Appointments

Clause controversies have turned. *See, i.e., PHH I, supra*, 839 F.3d at 7. The Appointments Clause itself is a "structural safeguard" that tethers federal officers to the "sovereign power of the United States, and thus to the people." *Bandimere, supra*, 844 F.3d at 1188 (Briscoe, J., concurring).

Notwithstanding the Court's clear articulation of guiding principles in *Free Enterprise Fund*, the case at bar exemplifies that the lower courts still grapple with a correct reading of that precedent. *See, i.e., Hill v. SEC*, 825 F.3d 1236, 1247-48 (11th Cir. 2016) (the complainant was "not in the type of precarious position the Supreme Court found unacceptable in *Free Enterprise Fund*"); *Bennett v. SEC*, 844 F.3d 174, 182 and 186 (4th Cir. 2016) (distinguishing on the facts, and declaring the plaintiff "reads too much into" and further "misreads" *Free Enterprise Fund*).

Indeed, one such troubling misapprehension of *Free Enterprise Fund* was displayed very recently in *PHH Corp. v. Consumer Financial Protection Bureau*, ___ F.3d ___, 2018 WL 627055 (D.C. Cir. January 31, 2018) (*en banc*) ("*PHH II*"). There, the *en banc* D.C. Circuit seemingly conflated multi-member administrative commissions with an agency controlled by a solitary head. *Id.*, ___ F.3d at _, slip op. at 9 and 32-33 (declaring as "untenable" any claim of a constitutional distinction between the CFPB's single director and "multi-member independent agencies," including amongst the latter the Securities and Exchange Commission, the Federal Trade Commission, and the Federal Reserve).

The reasoning of the *PHH II* court was substantially grounded upon its interpretation of *Free Enterprise Fund*. *PHH II*, ___ F.3d at ___ and ___, slip op. at 19-20 and 26-30. This is further evidence that the lower courts continue to struggle with ascertaining the true import of *Free Enterprise Fund*, and then correctly applying that landmark to Appointment Clause controversies.

It is of paramount importance that any misconceptions held by the courts of appeals regarding the meaning of *Free Enterprise Fund* be brought to an end. The need for such clarity is comprised of elements both specific and general.

With respect to the former, the federal securities laws assure disclosure, transparency, and honesty in our vital capital markets. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994). SEC ALJs play a major role in upholding that paradigm. The Court's decision in the case at bar shall ensure that Commission adjudicators henceforth fulfill their important role in the scheme of federal securities regulation in a manner consistent with *Free Enterprise Fund*.

Regarding the latter, and as already ably demonstrated in the preceding section, SEC ALJs are but one small component of the vast federal administrative construct. The Court's resolution of the matter at hand will further refine the teachings of *Free Enterprise Fund*, and thereby assure that all in-house adjudicators at a

multitude of agencies hold office in accord with the strictures of the Appointments Clause.

It must be remembered that *Free Enterprise Fund* is a major fortification, erected to safeguard separation of powers and checks and balances. In an era of an ever-sprawling nationwide bureaucracy, the two circuit cases directly relevant to the case at bar, as well as others discussed herein, reveal a troubling disparity in the lower courts' apprehension of that important precedent, at least with regard to the status of SEC ALJs, and possibly with respect to other administrative adjudicators.

For reason of the preceding, this *amicus curiae* respectfully suggests the Court's resolution of the question presented shall assure that *Free Enterprise Fund* is correctly applied by the lower courts.

III. THE COURT'S DECISION SHALL END THE INTERNECINE CIRCUIT CONFLICT OVER THE CONSTITUTIONALITY OF THE APPOINTMENT PROCESS FOR SEC ALJs.

In the wake of the Great Recession, remedial legislation "dramatically expanded" the authority of the SEC to bring enforcement actions before its in-house ALJs. *Tilton v. SEC*, 824 F.3d 276, 278-79 (2d Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 2187 (2017). Respondents in such cases were thus provoked to vigorously contest the power of the Commission's adjudicators to preside over these proceedings. *Id.*, 824 F.3d at 279. Such challenges nearly always invoked the

holding of *Free Enterprise Fund*, *supra*, 561 U.S. at 484, in support of the argument that, identical to the accounting industry oversight board members implicated in the aforementioned landmark, SEC ALJs likewise hold office in violation of the Appointments Clause of Article II. U.S. Const. art. II, § 2, cl. 2.

The instant controversy's first iteration resulted in a significant number of conflicting district court decisions. *See generally* Michael A. Sabino & Anthony Michael Sabino, "Challenging the Power of SEC ALJs: A Constitutional Crisis or a More Nuanced Approach?" 43 *Securities Regulation Law Journal* 369 (2015) (analyzing the then-extant cases). As these lower court controversies percolated to the appellate level, this divisiveness only increased, as a veritable legion of circuit court decisions evinced a deepening conflict.

One aspect of that division is before the Court today: the irreconcilable differences between the instant case and ruling of *Bandimere*, *supra*, 844 F.3d at 1182 (expressly disagreeing with the holding below in the case at bar). To be sure, Petitioners are irrefutably correct in calling attention to this clash of two key adjudicative bodies. Yet the disharmony amongst the appellate courts extends well beyond the two tribunals already mentioned.

When confronted by essentially the same scenario undergirding the instant case, a significant number of other circuits avoided the Appointments Clause question altogether, and confined their rulings to

jurisdictional grounds. *Bebo v. SEC*, 799 F.3d 765, 767-68 (7th Cir. 2015), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1500 (2016); *Jarkesy v. SEC*, 803 F.3d 9, 29-30 (D.C. Cir. 2015); *Tilton, supra*, 824 F.3d at 279 and 291; *Hill, supra*, 825 F.3d at 1237 and 1241; *and Bennett, supra*, 844 F.3d at 176 and 183.

Yet even within that subset of relevant holdings, the rationales proffered by the respective tribunals lack cohesion. *Compare Tilton, supra*, 824 F.3d at 279 and 282 (apparently giving equal weight to all three jurisdictional factors promulgated in *Thunder Basin Coal Co. v. Reich*, 501 U.S. 200 (1994), and further emphasizing the "closer questions" presented therein on the last two legs of the *Thunder Basin* test); *Hill, supra*, 825 F.3d at 1250 (finding the last two factors of *Thunder Basin* "do not cut strongly either way and thus do not persuade us"); *Bennett, supra*, 844 F.3d at 183 and 183 n.7 (while seeming to consider all three *Thunder Basin* factors, nevertheless declaring in a parenthetical the first element of *Thunder Basin* is "the most important"); *Jarkesy, supra*, 803 F.3d at 22 (*Thunder Basin* is comprised of mere "guideposts for a holistic analysis"); *and Bebo, supra*, 799 F.3d at 773 (emphasizing the importance of *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), to its jurisdictional analysis).

This plethora of appellate rulings demonstrates a pronounced dissonance amongst the Nation's tribunals which have confronted substantially the same circumstances as found in the case at bar. Even more troubling, and notwithstanding the diversity of methodologies employed, the decisions catalogued above do

share one key ingredient: each circuit panel avoided the precise Appointments Clause question presented in the matter at hand.

The existing disharmony might be propagated by the fact that some, if not all, of the holdings set forth above are beyond further scrutiny. Quite exemplary is the recent conclusion of the enforcement action underlying *Tilton*, *supra*. A subsequent decision by a Commission ALJ dismissed all charges. *In the Matter of Tilton, et al.*, Admin. Proc. File No. 3-16462 at 1 and 57 (September 27, 2017) (Foelak, A.L.J.). This development obviously forecloses further appellate review. Similar fates may yet follow for the other cases set forth hereinabove, placing a reconciliation between the differing circuits beyond reach.

In sum, essentially half of the circuit courts are effectively balkanized on the Appointments Clause question presented. Any opportunity for consensus at the level of the lower tribunals is well past. That reveals the true danger here: the prospect of additional appellate decisions inconsistently resolving the subject at issue, in holdings that might very well conflict with the Court's established Article II jurisprudence.

For these reasons, this *amicus curiae* respectfully suggests that the Court's explicit decision herein shall end the internecine circuit conflict over the constitutionality of the appointment process for SEC ALJs.

CONCLUSION

Respectfully, for all the reasons set forth above, the Court should resolve the question presented, and hold for Petitioners.

Respectfully submitted,

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